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10/518,320

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EXAMINER

BROWN, COURTNEY A

ART UNIT

PAPER NUMBER

1616

MAIL DATE

DELIVERY MODE

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

|                              |                                      |                                     |  |
|------------------------------|--------------------------------------|-------------------------------------|--|
| <b>Office Action Summary</b> | <b>Application No.</b><br>10/518,320 | <b>Applicant(s)</b><br>BROWN ET AL. |  |
|                              | <b>Examiner</b><br>COURTNEY BROWN    | <b>Art Unit</b><br>1616             |  |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 07 October 2008.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-7 and 9-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-7 and 9-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>10/7/2008</u> .   | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Acknowledgement of Receipt/Status of Claims***

This Office Action is in response to the amendment filed October 7, 2008. Claims 1-12 are pending in the application. Claim 1 has been amended. Claims 1-12 are being examined for patentability.

Rejections not reiterated from the previous Office Action are hereby withdrawn. The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set of rejections and/or objections presently being applied to the instant application.

### ***Information Disclosure Statement***

The information disclosure statement filed October 7, 2008 fails to comply with 37 CFR 1.98(a)(3) because it does not include a concise explanation of the relevance, as it is presently understood by the individual designated in 37 CFR 1.56(c) most knowledgeable about the content of the information, of each patent listed that is not in the English language. It has been placed in the application file, but all of the information referred to therein has not been considered.

### ***New Rejection(s) Necessitated by the Amendment filed on October 7, 2008***

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 1 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 1 recites the limitation "wherein the proportion of **aqueous** dispersed phase (s)" in line 4. There is insufficient antecedent basis for this limitation in the claim.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cai et al. (US Patent 6,451,295 B1) in view of Rieley et al. (US 2002/0119108 A1).

### ***Applicant's Invention***

Applicant claims a w/o (water/oil) emulsion antiperspirant composition comprising a dissolved antiperspirant salt, an emulsifier and, in a disperse phase separate from the dissolved antiperspirant salt, a polymer comprising Bronsted acid groups wherein the proportion of aqueous dispersed phase (s) within the total composition is from 50% to 90% by weight, excluding any volatile propellant that may be present.

### ***Determination of the scope and the content of the prior art (MPEP 2141.01)***

Art Unit: 1616

Cai et al. teach clear antiperspirant and/or deodorant compositions, especially clear sticks having good structural integrity (abstract) that are made as water in oil emulsions or water with glycol and oil emulsions (column 5, lines 25-26, claim 1 of instant application). Cai et al. teach that for antiperspirants and/or deodorants made with a type of gellant emulsion or suspension stick products may be formed. Cai et al. teach that if an emulsion is formed, characteristically it is with an internal phase and an external phase. Cai et al. teach that the external phase is defined as the continuous phase where liquids are interconnected and is defined as a suspended phase where liquids exist in a droplet form stabilized by surfactants and is the gelled oil phase that contains the antiperspirant active. Cai et al. teach that said external gelled oil phase contains at least one silicone fluid, at least one non-silicone organic emollient, and a siloxane-based polyamide gallant (polymer of instant application), as well as optional additives for said antiperspirant product such as surfactants, fragrances, additional emollients etc. Cai et al. teach that said internal phase consists of a liquid solution containing dissolved antiperspirant salt, and typically involves solvents such as water, propylene glycol, dipropylene glycol, tripropylene glycol, ethanol, 1, 2-hexanediol (column 17, lines 22-42, claims 1-3 of instant application). Cai et al. teach the use of silicone oil as a thickening agent (column 25, lines 42-47, claim 4 of instant application). Cai et al. teach the use of silicone fluids as gels that can be volatile or non-volatile and include linear siloxanes known as dimethicones, linear siloxanes containing an aromatic substitution such as phenyl trimethicone and the various cyclic siloxanes having from 4-6 siloxane units in a ring optionally substituted by C1-C6 alkyl or phenyl, particularly

Art Unit: 1616

cyclic dimethyl siloxanes such as cyclomethicones (column 18, lines 59-end, claim 5 of instant application). Cai et al. teach that said antiperspirant active materials of the composition, when utilized in appropriate amounts, primarily act to reduce malodor by reducing perspiration and have a deodorant function, for example, as an antimicrobial or bacteriostatic agent (column 23, lines 4-13, claim 8 of instant application). Cai et al. teach a method of manufacture wherein said antiperspirant/deodorant stick composition is formed by combining two phases (examples 1-7, column 31, lines 31-end to column 32, lines 1-end, claim 10 of instant application). Cai et al. additionally teach, in Example 3, antiperspirant/deodorant stick compositions formed by combining phase (A) comprising: 21% of the isoparaffin (Isopar-L from Exxon); 11% phenyltrimethicone; 12% cyclopentasiloxane; 13% siliconized polyamide; 4% isostearyl benzoate with phase (B): 29% of an antiperspirant active in 9% water (column 32, lines 5-16, also see Examples 3 and 4). It is the Examiner's position that the limitation in claim 1, wherein the proportion of aqueous phase(s) within the total composition is from 50% to 90% by weight, is the phase that comprises the polymer and is separate from the dissolved antiperspirant salt phase.

***Ascertainment of the difference between the prior art and the claims  
(MPEP 2141.02)***

The difference between the invention of the instant application and that of Cai et al. is that the instant invention requires the use of a polymer comprising carboxylic, sulphonic or phosphonic acid groups as opposed to amides. For this

Art Unit: 1616

reason, that the teaching of Rieley et al. is joined. Rieley disclose the use of Brnsted (i.e., Brønsted of instant application) carboxylic acid groups ([0023], claim 11 of instant application) in antiperspirant compositions.

***Finding of prima facie obviousness***

***Rationale and Motivation (MPEP 2142-2143)***

It would have been obvious to one of ordinary skill in the art at the time of the invention to combine the teachings of the two cited references to arrive at a w/o (water/oil) emulsion antiperspirant composition comprising a dissolved antiperspirant salt, an emulsifier and, in a disperse phase separate from the dissolved antiperspirant salt, a polymer comprising Bronsted acid groups. One would have been motivated to make this combination in order to receive the expected benefit of having a clear product with improved structural stability and integrity. “It would be prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose in order to form a resultant composition that is to be used for the very same purpose; the idea of combining them flows logically from their having been individually taught in prior art.” In re Kerkhoven, 205 USPQ 1069 (C.C.P.A. 1980).

Although the aforementioned references do not teach the use of the specific glyphosate and surfactant concentrations as claimed in the instant application, absent a showing of unexpected results, it would be obvious to one of ordinary skill in the art to vary the concentration amounts depending on the desired result and plant species.



Art Unit: 1616

Determining optimal concentrations of the herbicidal components is routine experimentation and is readily practiced by one of ordinary skill.

Additionally, it is routine optimization for one of ordinary skill in the art to adjust the amount of ingredients to optimize the desired results. In this case the weight percent ranges of the emulsifier, the level of Bronsted acid groups, and the proportion of the aqueous dispersed phase (s) are routine optimization (claims 6-8 of instant application).

***Examiner's Response to Applicant's Remarks***

Applicant's arguments, filed October 7, 2008, with respect to the 102 rejection of claims 1,5,11, and 12 as being anticipated by Rieley et al. (US2002/0119108) have been considered but are moot in view of the new ground(s) of rejection.

Applicant's arguments, filed October 7, 2008, with respect to the 103 rejection of claims 1-12 over Cai et al. (US Patent 6,451,295) in view of Reiley et al. (US2002/0119108) have been considered but are moot in view of the new ground(s) of rejection. Since the teachings of Cai et al. and Reiley et al. are still applied, Applicant's arguments pertaining to these references are addressed below. Applicant has amended claim 1 to specify that the proportion of aqueous dispersed phase(s) within the total composition is from 50% to 90% by weight, excluding any volatile propellant that may be present. Applicant argues that Reiley et al. teaches away from the high water content compositions of amended claim 1. The Examiner agrees. However, the

Art Unit: 1616

teaching of Reiley et al. was joined to show that the use of a polymer comprising carboxylic, sulphonic or phosphonic acid groups was known at the time of the instant invention.

The claims remain rejected.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Information regarding the status of an application may be obtained from

Art Unit: 1616

the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR Only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Courtney Brown, whose telephone number is 571-270-3284. The examiner can normally be reached on Monday-Friday from 8 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's Supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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/Mina Haghighatian/  
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